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Supreme Court, U.S.
FILED
OCT 29 2001

No. 00-1614

IN THE
Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION
Petitioner,

v.

ABNER J. MORGAN, JR.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

PAMELA Y. PRICE, ESQ.
Counsel of Record
PRICE AND ASSOCIATES
1617 Clay Street
Oakland, CA 94612
(510) 452-0292

HOWARD J. MOORE, JR., ESQ.
MOORE AND MOORE
445 Bellevue Avenue, 2nd Floor
Oakland, CA 94610
(510) 451-0105

WILLIAM MCNEILL, III, ESQ.
JORY C. STEELE, ESQ.
Employment Law Center, A Project of
the Legal Aid Society of San Francisco
1663 Mission Street, Suite 400
San Francisco, CA 94103
(415) 864-8848

Attorneys for Respondent

Wright Appellate Services 1019
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

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QUESTIONS PRESENTED

Where unlawful discrimination allegedly occurs within the 180/300 day charge filing period, may an employer also be held liable for discrimination occurring prior to the charge filing period if the earlier discrimination was sufficiently like or related to the discrimination occurring with the period that the employer was on notice of the need to investigate those earlier events?

Where a hostile work environment is claimed to exist within the 180/300 day charge filing period, must the trier of fact consider acts of harassment and/or other discrimination occurring outside of the charge filing period which may have helped create the hostile environment in order to determine the employer's liability?

In a discrimination case, is the trier of fact permitted to consider evidence of the employer's conduct or acts of harassment occurring prior to the 180/300 day charge filing period in order to determine the employer's motive and intent, or the existence of a hostile work environment with the charge filing period?

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3 *Wharton's Criminal Law* (15th ed. 1995) 35

STATUTES AND REGULATIONS INVOLVED

The full text of the following statutes can be found in Respondent's Supplemental Appendix.

15 U.S.C. § 15b.

42 U.S.C. § 2000e-5(e)(1).

42 U.S.C. § 2000e-5(g)(1).

42 U.S.C. § 2000e-16(b) - (d).

29 C.F.R. § 1614.501(a)(4).

29 C.F.R. § 1614.501(b)(3).

29 C.F.R. § 1614.501(c)(1).

STATEMENT OF THE CASE

Abner Morgan worked for Amtrak from August 1990 until March 1995. Amended Declaration of Abner Morgan ("Morgan Decl."), Civil Docket ("CD") No. 106 at 2, 6, 7.[1] In August 1990, Amtrak was taking over the Oakland Yard from Southern Pacific Railroad. Declaration ("Decl.") of Joe George, CD No. 98 at 1-2. Most of Morgan's co_workers were or had been Southern Pacific Railroad employees, including most of his managers. *Id.*

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[1] Whenever a declaration or deposition is referenced, it refers to a Declaration or deposition filed in the District Court in Opposition to Amtrak's Motion for Summary Judgment. The initial numbers refer to the Civil Docket. Page numbers are to the actual pages in the document.

On February 25, 1991, Morgan was asked to come to a meeting with his supervisor, Jerry Denton, and the facilities manager, Robert Vandenburg. Morgan Decl., CD No. 106 at 2. When Morgan refused to attend the meeting without union representation, he was terminated for insubordination in violation of Rule L. *Id*.. After filing a union grievance, Morgan was reinstated and the termination was reduced to a 10-day suspension. *Id* at 2-3. This was the harshest discipline imposed on any employee at the Yard for a Rule L violation during the period between 1989 and 1992. Trial Tr. at 1651-52.

During his tenure at Amtrak, Morgan was subjected to a barrage of disciplinary charges, even though white employees were rarely, if ever, disciplined for comparable behavior. CD No.93, Deposition ("Dep.") of Gary A. Biemborn at 147-50; CD No. 93, Dep. of Elwood Conley at 20-24, 28-29; CD No. 93, Dep. of Glenn O. Fisher at 44-46, 50-53; CD No. 93, Dep. of Greg Hourigan at 56-59; Decl. of Robert Ramirez, CD No. 100 at 1-3. Racial epithets and disparate treatment of African American employees were common, particularly of Morgan. Decl. of Michael Williams, CD No. 91 at 2; Decl. of Meriola Gotthardt, CD No. 99 at 2; Decl. of Arthur Elwood Conley, CD No. 92 at 2; Decl. of Joe George, CD No. 98 at 2; CD No. 93, Conley Dep. at 20-24, 28-29.

Morgan was repeatedly denied access to training and training opportunities. Morgan Decl, CD No. 106 at 3-5. When he asked about receiving further training, he was told he "stood a snowball's chance in hell of becoming an electrician in the Oakland Yard." *Id*, at 3. He was also assigned demeaning tasks outside of his craft that no white electrician was ever assigned. *Id*.; Ramirez Decl., CD No. 100 at 1-2.

During Morgan's tenure, the Yard was managed by a small group of managers. Vandenburg, the top official at the Yard, was heard to state that he didn't want too many blacks as supervisors because of "too many problems." CD No. 93, Conley Dep. at 23-24. His second-in command, Ray Borge, was referred to by an African-American manager as "the Mark Fuhrman of Oakland." CD No. 93, Dep. of Raymond P. Borge at 136-37. Borge had a habit of calling African-Americans "shuffle-butt ni–ers" and even performed 'the shuffle-butt ni–er" dance for his co-supervisors, including Vandenburg. CD No. 93, Conley Dep. at 21, 28-29. Other managers, including Robert Bordenave, Joe Deely and Jerry Denton were overheard using the "N" word at various times. Williams Decl., CD No. 99 at 2; CD No. 93, Conley Dep. at 21, 28-29; Gotthardt Decl., CD No. 99 at 2.

Morgan repeatedly sought solace from Amtrak's EEO office by complaining about the discrimination, retaliation and harassment he experienced at Amtrak's Oakland Yard. Morgan Decl., CD No. 106 at 5, 7. This only exacerbated the poor treatment he received. Despite his numerous letters to Amtrak's EEO office, little, if anything, was ever done to change the behavior of these supervisors. Early on, they began a concerted campaign to fire him.

In July 1993, Vandenburg tried to coerce Ken Phillips (Morgan's coworker) into changing a statement regarding an interaction involving Morgan and a union official at the Yard to reflect negatively on Morgan. CD No. 93 Dep. of Kenneth Phillips at 60; Trial Tr. at 1043, 1052-1057. Vandenburg told Mr. Phillips that he could make Mr. Phillips' life better for him if Mr. Phillips would change his statement, and that "they were going to fire [Morgan] anyways [sic]."

Trial Tr. at 1055. Mr. Phillips refused and was thereafter subjected to retaliation himself. Trial Tr. at 1054-55.

This campaign of harassment and retaliation culminated in Morgan's termination in 1995 for allegedly "threatening" one of his supervisors. Thereafter, on February 27, 1995, Morgan filed a broad charge with the EEOC alleging a *continuing* course of discriminatory conduct and retaliation against him and other Black employees. Morgan Decl., CD No. 106.

In a pretrial order, the district court dismissed Morgan's claims outside the 300 day charge filing period and a number of claims within the relevant time period on summary judgment. Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, CD No. 119. The district court's summary judgment order limited the trial to three discrete incidents within the charge filing period. *Id.*

The district court further excluded relevant evidence in the Final Pretrial Order. It allowed Morgan to present evidence of his work history at Amtrak outside the charge filing period, but limited such evidence to "background" or "context." Final Pretrial Scheduling Order, CD No. 176. During the trial, the district court repeatedly issued limiting instructions, informing the jury that the evidence outside the 300 day period was only for "background." The first limiting instruction came during the voir dire, and continued to be made virtually every time any facts from outside the charge filing period were presented. Trial Tr. at 23-24, 187-88, 310-14, 320-21, 431-33 The district court also issued these

same limiting instructions as final instructions to the jury.[2] Trial Tr. at 2729-31.

The district court further determined that evidence of discrimination or retaliation against people besides Morgan would be determined on a case-by-case basis. Trial Tr. at 86-93. A number of witnesses were not permitted to testify to the discrimination they had witnessed against other African Americans by Morgan's supervisors. For example, testimony by one of Morgan's coworkers regarding the disparate disciplinary actions levied by Amtrak supervisors against African-Americans was excluded by the trial court because it found the evidence to be "beyond the scope of this case." Trial Tr. at 922-26.

The district court also severely limited the presentation of the hostile work environment evidence. Order re Hostile Environment Claim ("HWE Order"), CD No. 194. It ruled that although a hostile work environment claim remained after the summary judgment order, the only evidence the jury could consider was evidence from within the 300 day charge filing period. *Id.*

During its deliberations, the jury repeatedly submitted questions to the court seeking clarification regarding the evidence presented and the instructions given about the evidence. Trial Tr. at 2847-49, 2851-59. The questions indicate that the jury was totally confused about what weight

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[2] The fact that Morgan's counsel did not object directly to these final instructions is of no consequence because there were repeated objections made to these instructions throughout the trial. *See Lang v. Tex. & Pac. Ry. Co.*, 624 F.2d 1275, 1279 (5th Cir. 1980); *Batesole v. Stratford*, 505 F.2d 804, 808 (6th Cir. 1974).

to place on evidence from both inside and outside the charge filing period. First, the jury asked two questions, the first of which was, "Why was the time, May '94 through February '95, chosen for deliberations? The bulk of the evidence has been previous." Trial Tr. at 2847. In response, the district court invoked the 300 day charge filing period as the limitations period for both liability and evidence. Trial Tr. at 2847-48.

After receiving the district court's initial response, the jury deliberated further, but still unclear on the issues surrounding the relevant time frame, asked another series of questions. Trial Tr. at 2851. The first question was: "Do plaintiff's complaints about discrimination have to have occurred during the time period from May'94 to February '95?" *Id.* The district court, after further oral argument about what answer to give, responded esssentially not, but again limited their consideration of the evidence to the 300 day charge filing period. Trial Tr. at 2858.

The jury, after receiving the answers to its questions, found against Morgan. The verdict was delivered, however, along with a note entitled "Jury Comments on Verdict" which contained five (5) paragraphs. (Jury Comments on Verdict, CD at 240. Paragraph Four of the note commented on the retaliation claim; Paragraph 5 commented on the hostile environment claim.

On appeal, the Ninth Circuit reversed the district court's interpretation of the continuing violation doctrine, but did not reach the evidentiary issues. *Morgan*, 232 F.3d at 1017-18. This Court granted review solely on the applicability and interpretation of the continuing violation doctrine. *Nat'l R.R.*

Passenger Corp. v. Morgan, ___ U.S. ___; 121 S. Ct. 2547 (2001).

SUMMARY OF ARGUMENT

This case presents three distinct issues: (1) whether and under what circumstances an employer who engages in a continuing pattern of discrimination which continues into the charge filing period is immune for liability for acts occurring prior to the charge filing period; (2) whether harassment occurring prior to the charge filing period may be relied on by a plaintiff to demonstrate the existence of a hostile environment *during* the charge filing period; and (3) whether proof of intentional discrimination, including retaliation and/or an actionable hostile environment during a charge filing period can be based in part on evidence of discriminatory conduct which occurred *prior* to the charge filing period.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), a unanimous Court recognized that ongoing violations of federal anti-discrimination laws must be treated differently from discrete, isolated unlawful acts. The Court recognized that where the plaintiff alleges a continuing violation, concerns regarding staleness or prejudice to the defendant are absent or diminished. Simply put, an employer that maintains a continuing violation neither deserves nor obtains the repose afforded by the statute of limitations. Furthermore, the "trigger" for the statute of limitations must be the last occurrence of the unlawful practice.

The 180/300 day charge filing period in Section 706(e)(1) does not limit the scope of recovery in an otherwise timely Title VII action. 42 U.S.C. § 2000e-5(e)(1). The charge fil-

ing requirement is only a part of the administrative exhaustion process. Congress' concern in enacting the procedural steps to secure enforcement of Title VII was to ensure prompt notification to the employer. Although § 706(e)(1) addresses the time limits for filing a charge with the EEOC, it does not purport to delineate the scope of the relief that a court might subsequently provide, or the temporal or substantive range of violations which a court might ultimately address. Where an ongoing violation begins before and continues into the charge filing period, a charge filed within 180/300 days of the last occurrence constitutes adequate exhaustion for the entire violation.

Section 706(g)(1) of Title VII, which allows back pay awards up to two years decisively demonstrates that the charge filing period does not limit the period for which relief can be obtained. This two year back pay rule would be meaningless if the employer's liability was to be determined solely by reference to the shorter 180/300 day period established by § 706(e)(1). Basing the amount of back pay on the length of the charge filing period would have peculiar and inconsistent consequences in the variety of situations where Congress has mandated relief pursuant to the remedial provisions of Title VII.

The explicit language in Title VII referring to an "unlawful employment practice" provides a statutory basis for the continuing violation doctrine. Section 706(e)(1) requires that a charge be filed within a specified number of days of the unlawful "practice." Unlike a discrete act of discrimination, like a dismissal, a practice can endure or recur over a period of time. Petitioner's contention that § 706(e)(1) must always be construed to require the filing of a charge within

180/300 days of each "discrete act" without regard to continuing violations is inconsistent with the wording, purpose and intent of the statute.

The EEOC, having assumed the role once played by the Civil Service Commission regarding administrative complaints of discrimination by federal employee, has followed and applied the continuing violation doctrine for at least thirty (30) years. The EEOC's federal sector regulation, 29 C.F.R. § 1614.105(c)(1), as well as Management Directive 110, which both codify the doctrine, are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Past interpretations of other statutes are of little value in construing Title VII's particular language. The Clayton Act, for example, provides that "[a]ny action . . . shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15(b). Title VII contains no such express accrual rule. Similarly, the types of recurring violations that occur under Title VII are virtually unknown in NLRA cases and its provisions are materially different with respect to the exhaustion requirements, limiting its precedential value.

The proper formulation of the continuing violation doctrine derives from the text of Title VII itself and from the purposes of a statute of limitations. Thus, discrimination occurring prior to the charge filing period may be redressed where that earlier discrimination is sufficiently similar in method or purpose to the discrimination alleged by the charge to have occurred within the charge filing period that the employer can fairly be said to have been put on notice of the need to inquire into the relevant pre-charge filing period

events. This formulation strikes an appropriate balance between the broad remedial purpose of Title VII and the notice purpose of the filing requirement. *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 398 (1982).

Imposing a notice requirement on Title VII would focus exclusively on the desire to encourage prompt filing of claims and conflict with harassment victims' entitlement to the maximum benefit of the law. A desire to encourage prompt filing of claims cannot undermine the broad remedial purpose of the anti-discrimination law and destroy the balance created by this Court in *Zipes*.

There is a natural affinity between hostile environment claims and continuing violations. In a hostile environment case, it is the environment itself that constitutes the violation, not the individual acts of harassment which cause that environment. Pre-charge filing period harassment normally contributes to establishing an unlawful hostile environment and must be considered by the trier of fact in every circumstance. The district court erred in holding that a plaintiff, in attempting to show the existence of a hostile environment within 300 days of his charge, could not rely on earlier acts of harassment. This error alone mandates affirmance of the Ninth Circuit's decision reversing the judgment in favor of Amtrak.

The district court also erred in forbidding the plaintiff to present evidence of, or even to assert during trial that intentional discrimination had occurred more than 300 days prior to his Title VII charge. This Court has repeatedly held that intentional discrimination prior to the charge filing period may be utilized to prove an employer's motive during that period. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This error also mandates affirmance of the

Ninth Circuit's decision reversing the judgment in favor of Amtrak.

I. TITLE VII REQUIRES COURTS TO PROVIDE REDRESS FOR DISCRIMINATION THAT OCCURRED PRIOR TO THE CHARGE FILING PERIOD IF IT IS PART OF A CONTINUING VIOLATION THAT CONTINUED INTO THE CHARGE-FILING PERIOD

Nineteen years ago, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) recognized that ongoing violations of federal anti-discrimination laws must be treated differently from discrete, isolated unlawful acts. *Havens Realty* involved an interpretation of § 812(a) of the Fair Housing Act, which requires that certain actions under that statute be commenced within 180 days of the unlawful practice. The Court rejected the defendant's contention that each instance of an ongoing violation triggered a separate 180 day limitation period.

A unanimous Court held that a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. *Id.* at 380. In *Havens Realty*, the Fourth Circuit had permitted recovery for discrimination occurring outside the limitations period by allowing plaintiffs Coleman and Willis to pursue all of their claims because a single incident fell within the limitations period. Based upon the single incident within the limitations period, the Court held that none of the claims were barred. *Id.*

It is conceded that each of the specific acts of the defendants except the one of July 13 transpired more than 180 days before the complaint was filed. . . . The plaintiffs

contend that the "occurrence" is the defendants' continuing practice of racial steering and that the 180 days commences with the last act--in this case the violation of July 13. We agree with the plaintiffs and hold that none of the allegations in the complaint are time-barred by the 180-day provision.

Coles v. Havens Realty Corp., 633 F.2d 384, 391-92 (4th Cir. 1980).

This Court agreed with the Fourth Circuit: [F]or purposes of § 812(a), a "continuing violation" of the Fair Housing Act should be treated differently from one discrete act of discrimination. Statutes of limitations such as that contained in § 812(a) are intended to keep stale claims out of the courts. *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). ***Where the challenged violation is a continuing one, the staleness concern disappears.*** Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968). *Cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 398.

Havens Realty, 455 U.S. at 380 (emphasis added). Notably, the *Havens Realty* Court cited *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385 (1982), a Title VII case, where it struck a balance between the remedial purpose of the legislation and the notice purpose of the filing requirement. The Court further held:

> Applying this principle to the "neighborhood" claims of Coleman and Willis, we agree with the Court of Appeals that the 180-day statute of limitations is no bar. . . . Plainly the claims, as currently alleged, are based not solely on isolated incidents involving the two respondents, but a continuing violation manifested in a number of incidents--including at least one (involving Coles) that is asserted to have occurred within the 180-day period. *Havens Realty*, 455 U.S. at 381. Thus, the Court permitted recovery for discrimination occurring prior to the 180-day period because it was part of a continuing violation that extended into the period of limitations, and the action was filed within 180 days of the *last occurrence*. *Id.* at 380.[3]

The decision in *Zipes* was issued on the same day as *Havens Realty* on February 24, 1982.[4] In *Zipes*, the District Court presumed that the violation continued until the airline changed its policy of grounding all female flight cabin attendants who became mothers, while their male counterparts who became fathers were permitted to continue flying, and granted the plaintiff class' motion for summary judgment. The Court of Appeals affirmed the summary judgment on liability, but denied relief to

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[3]In his dissenting opinion in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), Justice Marshall pointed out that: "Title VII recognizes that certain violations, once commenced, are continuing in nature. In these instances, discriminatees can file charges at any time ***up to 180 days after the violation ceases.*** (They can, however, receive back pay only for the two years preceding the filing of charges with the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. V).)" *Id.* at 561 (Marshall, J., dissenting) (emphasis added).

[4]*Havens Realty* was heard on December 1, 1981; *Zipes* was heard on December 2, 1981.

most of the class members because they had never filed Title VII charges. A unanimous Supreme Court reversed and agreed that timely filing by each class member is not a prerequisite to class-wide relief in a Title VII lawsuit. 455 U.S. at 393.

Prior decisions of this Court on which Petitioner relies did not involve allegations of continuing violations, or of illegal acts subsequent to the adverse employment decision which constituted the basis of the claim. *Delaware State College v. Ricks*, 449 U.S. 250, 252 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Int'l Union of Elec. Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 231-232 (1976).

In *Ricks*, 449 U.S. at 257, the Court specifically held that "[i]f Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts." Quoting the Ninth Circuit,[5] the Court held thatthe proper focus is on the time of the discriminatory act. *Id.* That admonition was repeated by the Court a year later in *Chardon v.* Fernandez, 454 U.S. at 8, and then again, eight years later in 1989, in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 907(1989)

In this case, we urge the Court to hold that under Title VII, as under the Fair Housing Act, ongoing violations of the law must be treated differently than discrete, unrelated acts of discrimination. Consistent with *Havens Realty*, the appropriate rule for cases such as this one is to allow liability for a continuing violation where there is discrimination prior to the 180/300 day

[5] *See Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979).

charge filing period that is sufficiently similar in method or purpose to the discrimination alleged by the charge to have occurred within the charge filing period that the employer can fairly be said to have been put on notice of the need to inquire into the relevant pre-charge filing period events.

A. The 180/300 Day Charge Filing Period Is an Exhaustion Rule Not a Limitation on the Scope of the Employer's Liability

Title VII establishes two deadlines which must be met as a precondition of maintaining an action. First, the plaintiff must have filed a charge within the requisite period--here 300 days--of the unlawful practice; the filing of that charge commences the Title VII exhaustion process. Second, the plaintiff must file suit within 90 days of receiving a right to sue letter from the EEOC. Neither of these rules delineates the period of time for which relief can be awarded to redress a continuing unlawful practice.

"[A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). The filing of a charge does not commence a formal adjudicatory process. Rather, the charge is the first step of an informal administrative process. The charge calls the existence of an alleged violation to the attention of the EEOC, and sets in motion an investigation. Where the investigation leads the Commission to hold that reasonable cause exists to conclude a violation has occurred, Title VII directs the Commission to attempt to conciliate the dispute. The overarching purpose of this administrative process is to resolve employment discrimination claims without the necessity of litigation. *See West v. Gibson*, 527 U.S. 212, 218-19 (1999).

The strictures that might be applied to a complaint in a civil action are not imposed on a Title VII charge. The statutory requirements regarding a Title VII charge are liberally construed, in light of Congress' awareness that these charges would ordinarily be filed by laymen without the assistance of counsel. *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). The scope of the investigation the EEOC may pursue is not strictly limited by the terms of the charge. *EEOC v. Shell Oil Co.*, 466 U.S. at 68-74. This Court has declined to require Title VII class members to file any charges at all, reasoning that doing so would impose an undue burden on discrimination victims. *Zipes,* 455 U.S. at 397; *cf. Bazemore v. Friday*, 478 U.S. 385, 405-06 (1986).

In *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 371-72 n.n.29 & 30 (1977), the Court recognized that Congress' concern for the need of time limitations in enacting the procedural steps to secure enforcement of Title VII was "directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator." Title VII requires the EEOC to give the employer prompt notice so "that he would have the opportunity to gather and preserve the evidence with which to sustain himself when formal charges are filed and subsequent enforcement proceedings are instituted." *Id.* at 371 n.30 (quoting 117 Cong. Rec. 31972 (1971)).

Thus, although § 706(e)(1) addresses the time limits for filing a charge with the EEOC, it does not purport to delineate the scope of the relief that a court might subsequently provide, or the temporal or substantive range of violations which a court might ultimately address. Even with regard to the exhaustion process itself, § 706(e)(1) does not purport to establish a standard for determining which discriminatory practices occurring

within the charge filing period could fairly be said to have been encompassed by a given charge. *See* Part F *infra*.

B. The Existence of the Two Year Back Pay Rule in Section 706(g) Demonstrates That the Charge Filing Period Does Not Limit the Scope of Liability

Section 706(e)(1) provides that "[a] charge under this section shall be filed within" a specified number of days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Section 706(g)(1) provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C.

§ 2000e-5(g)(1). Since § 706(g)(1) limits back pay awards to no more than two years prior to the filing of the charge, it is clear that the 300 day charge filing period does not limit the period for which liability can be established.

1. The Text of Section 706(g)(1) Compels this Interpretation of Title Vii

The temporal scope of the claims for which a plaintiff can obtain back pay in a Title VII action turns on the interrelationship between § 706(e)(1) and § 706(g)(1). On the face of Title VII, it is § 706(g)(1), not § 706(e)(1), which delineates the point in time for which monetary relief in the form of back pay can be provided. It would have been nonsensical for Congress to create a back pay provision (§ 706(g)(1)) that permits plaintiffs to recover damages from their employer for a time period for which the employer could not be held liable.

Section 706(g)(1) recognizes that back pay losses caused by an unlawful practice could have been occurring for several years

prior to the filing of the charge, and provides that the employer will only be liable for those losses suffered within two years before that charge.[6] Section 706(g)(1) necessarily means that in appropriate cases, a plaintiff can seek to establish liability beyond the 180/300 day charge filing period since back pay could only "accrue" if it were caused by an actionable violation. For example, back pay could only be awarded for wages lost one year prior to the charge filing if the plaintiff showed that the discriminatory practice was occurring on or before that date.

Sections 706(e)(1) and 706(g)(1) thus address two distinct issues that arise where a discriminatory practice spans a period of time. Where a timely charge is filed (i.e., within 180 days of the last occurrence), § 706(e)(1) is satisfied, and ceases to be of relevance. Section 706(g)(1) delineates which injuries caused by that ongoing practice can be redressed, limiting back pay to amounts accruing later than two years before the charge. Read together, these provisions treat an ongoing discriminatory practice as an ongoing violation, only part of which need occur within the charge filing period in order for the entire period of violation (subject to the two year back pay rule) to be subject to judicial redress.

[6] Until now, employers filing the amicus briefs in this Court had repeatedly insisted that the two-year rule in § 706(g)(1) governed the beginning of the back pay period. Brief on Behalf of the Chamber of Commerce of the United States at 36 n.53, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (No. 74-389) ("[W]hen an employer is charged with a Title VII violation, his potential liability for back pay extends backwards two years prior to the date the charge is filed with the Commission. (§ 706g)."); Brief of the Texas Association of Business at 12 n.16, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) (No. 76-99) ("[B]ack pay liability on all issues raised in the EEOC's lawsuit extends back to March 9, 1969, two years prior to the filing of the original charge."); *See also* Brief for Petitioner at 17 n.29, *Occidental* (No. 76-99) (§ 706(g) provides a limitation on back pay liability of two years prior to the filing of the charge).

If, as Petitioner asserts, § 706(e)(1), means that a plaintiff cannot obtain redress for discriminatory practices occurring more than 300 days (or less) before the filing of the charge, the two year limitation in § 706(g)(1) would be meaningless. Recognizing that § 706(e)(1) cannot be construed in a manner which renders the two-year rule surplusage, the United States contends the § 706(g)(1) two year rule would still have some application even if § 706(e)(1) established a shorter 300 (or less) day limitation. The examples hypothesized by the United States are so implausible, however, as to confirm that its proposed interpretation of § 706(e)(1) must be mistaken.[7]

The existence, legislative history and manifest meaning of § 706(g)(1) make clear that the charge filing deadlines of §

[7] The United States urges, first, that the two year limitation would be important in a case in which charge filing period had been tolled, so that a charge about a long-past violation (e.g., a dismissal 4 years earlier) would nonetheless be timely under § 706(e)(1). Br. for the United States at 25. This explanation is an academic exercise in the barely conceivable. For the two year rule to have any impact, the charge filing period would have to be tolled for at least 550 days in a non-deferral state (2 years minus 180 days), and no less than 430 days in a deferral state (2 years minus 300 days). The government has not identified any case in which this unlikely circumstance occurred either before or after the adoption in 1972 of § 706(g)(1).

706(e)(1) do not themselves limit the employer's liability.[8] Even § 706(g)(1) does not declare that a continuing violation is not actionable to the extent that it occurred more than two years before a charge. Rather, § 706(g)(1) only bars a particular type of remedy--back pay--to redress continuing violations originating more than two years before a charge.

2. The Prior Decisions of this Court Treat the Two Year Rule, Not the 180/300 Day Charge Filing Period, as the Limit on Back Pay

The past decisions of this Court have repeatedly read § 706(g)(1) to mean that the two year rule defines the point in time at which back pay can begin to accrue. In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 791 n.9 (1976); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 412 n.13 (1975).

In the government's view, Congress' struggle over the language of § 706(g)(1) was pointless, since the shorter § 706(e)(1) charge filing period was actually the controlling provision. The Court's understanding is obviously inconsistent with Petitioner's assumption that back pay awards have always been limited by the charge filing period, which prior to 1972 was as short as 90 days.

In *City of Los Angeles v. Manhart*, 435 U.S. 702, 722 n.42 (1978), in describing the period of time that would be encompassed by an award of monetary relief, the Court used the two year period in § 706(g) rather than the charge filing

period.

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[8]The legislative history is described in the *amicus* brief of the NAACP Legal Defense Fund filed in this case.

3. Basing the Amount of Back Pay on the Length of the Charge Filing Period Would Have Peculiar and Inconsistent Consequences

Petitioner and the United States assume that the charge filing period is simply and always a standard 300 days; were that the case all individuals who are victims of the same discrimination and who file charges on the same date would receive the same amount of back pay. In fact, the applicable charge filing period in non-federal sector Title VII cases depends, in the first instance, on whether the alleged violation occurred in a state or political subdivision which has its own statute or ordinance prohibiting employment discrimination, a so-called "deferral jurisdiction." Outside of deferral jurisdictions the charge filing period is 180 days. 42 U.S.C.§ 2000e-5(e)(1). In a deferral jurisdiction the charge filing period can be as much as 300 days. Within deferral states, the actual period is often less. Aggrieved individuals must file a charge with the EEOC within 300 days of the last occurrence of the discriminatory practice, or within 30 days after termination of proceedings by the state or local agency, whichever is less. *Id.* If the state or local proceedings are not terminated before the 300th day, the complainant can only file a charge with EEOC if he or she has earlier commenced proceedings with the state or local agency and waited for 60 days. The combined effect of these provisions is to create four different rules in deferral states.

With regard to the other statutory schemes which incorporate Title VII remedies, it would often be impracticable to use a charge filing period to determine the temporal scope of back pay. In 1972, Congress amended Title VII to extend its protections to most employees of the executive branch. 42 U.S.C. §

2000e-16. But § 717 of Title VII, unlike § 706(e)(1), did not establish any statutory charge filing deadline; rather, it authorized the Civil Service Commission (now the EEOC) to establish an administrative complaint process.

The step most analogous to a Title VII EEOC charge in this process is the filing of a "complaint" under 29 C.F.R. § 1614.106. The deadline for filing such a complaint is only 15 days, and it runs from the receipt of notice that pre-complaint counseling has failed, not from the date of the discriminatory practice. 29 C.F.R. § 1614.105(d). The deadline triggered by the discriminatory practice itself is a 45-day period to contact on EEO Counselor, a step which bears no resemblance to the filing of a charge. 29 C.F.R. § 1614.105(a)(1). Both of these periods are dramatically shorter than the Title VII charge filing periods applicable to workers outside the federal government. Nonetheless, § 717 makes § 706(g) expressly applicable to any civil action brought by such a federal employee. 42 U.S.C. § 2000e-16(d).

The 1991 Civil Rights Act for the first time applied to certain state and local political appointees the substantive protections of Title VII, 2 U.S.C. § 1220(b)(1),[9] and established for them a separate remedial process. 2 U.S.C. § 1202. Complaints must be filed with the EEOC within 180 days of the alleged violation,

[9]This provision applies to a member of an elected official's "personal staff," an employee who serves an elected official "on the policymaking level," or one who serves an elected official "as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." 2 U.S.C. § 1220(a).

but under this statutory scheme, those complaints initiate a formal adjudicative process. There is no pre-complaint conciliation process analogous to a Title VII EEOC charge. Again, remedies are governed by § 706(g) of Title VII.

Under the Congressional Accountability Act of 1995, the antidiscrimination prohibitions of Title VII apply to most legislative employees. 2 U.S.C. § 1311(a)(1). There is no step comparable to the filing of an EEOC charge. Aggrieved congressional employees must first request counseling from the Office of Compliance. 2 U.S.C. § 1402. Once counseling has terminated, the worker has 15 days to request mediation by that Office. 2 U.S.C. § 1403. At the end of the mediation period, the worker has 90 days to file suit in federal district court.

2 U.S.C. § 1404. The remedy under the Act is "such remedy as would be appropriate if awarded under section 706(g) of the Civil Rights Act of 1964." 2 U.S.C. § 1311(b)(1)(A).

Finally, § 501 of the Rehabilitation Act forbids discrimination on the basis of disability in federal employment. 29 U.S.C. § 791. Although § 505 requires an aggrieved individual to complain before bringing a civil action, it establishes no deadlines for the filing of such complaints. Section 505 of the Act provides that the remedies for any violation will be those provided by §§ 706(f)-(k) of Title VII. 29 U.S.C. § 794a.

The evident purpose of Congress in incorporating the remedial provisions of § 706(g) into other statutes was to provide the same remedies that would be accorded in an action brought under Title VII. If the employer's liability for back pay is governed by the two-year rule in § 706(g), the remedy afforded to claimants who file timely charges will be the same, regardless

of the statutory scheme under which they proceed. If, as Petitioner and the United States imply, the employer's liability for back pay is limited to the charge filing period, the remedies will vary widely.

4. Neither the 180/300 Day Charge Filing Period Nor the Two Year Back Pay Rule Limit the Period for Which Compensatory And/or Punitive Damages Can Be Awarded

Congress' treatment of compensatory and punitive damages awards under Title VII is expressly, and deliberately, different than that of the back pay awards. Congress did not impose a temporal limit on compensatory and punitive awards in the 1991 amendments, despite its knowledge of the two-year time limitations on back pay awards. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-98 (1979) (stating that Congress is presumed to know the existing laws and their interpretation while it is drafting new legislation); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995).

The legislative history of § 706(g)(1) makes clear that the primary concern of Congress in adopting the two year rule was to protect employers from liability for back pay accruing over many years or even decades. When Congress authorized awards of compensatory and punitive damages in 1991, it recognized that such damages posed a similar risk of large awards. With regard to compensatory and punitive damages, Congress opted to solve the problem in a different manner, by imposing caps on the total amount of such awards.

A temporal limitation on compensatory and punitive awards would often be impracticable as well as ineffective. The pain

and suffering inflicted, for example, by sexual harassment cannot in any meaningful manner be allocated to particular months or weeks, and thus, could not effectively be limited by a rule such as § 706(g)(1) or § 706(e)(1). Clearly, the courts are not at liberty to add the very limitation which Congress declined to utilize.

C. The Continuing Violation Doctrine Is Consistent with the Statutory Language in Section 706(e)(1)

Petitioner urges this Court to hold that Title VII's charge-filing requirement is triggered by each separate occurrence of any "discrete act" of discrimination.[10] Section 706(e)(1), however, does not require the filing of a charge within 180 or 300 days of each "discrete act." Rather, the actual language in Title VII requires the filing of a charge within the specified number of days after an "unlawful employment *practice*" and provides a statutory basis for the continuing violation doctrine. 42 U.S.C. 2000e-5(e)(1) (emphasis added).

This Court has repeatedly recognized that "[t]he starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). When looking to the explicit language of a federal statute, the words therein should be "interpreted as taking their ordinary, contemporary, common meaning," unless those words are otherwise defined. *Perrin v. United States*, 444 U.S. 37, 42 (1979). When constru-

[10] Petitioner's Brief at 2, 10, 11, 13 n.3, 14, 15 n.5, 22, 29.

ing the statute, "it is appropriate to assume that the ordinary meaning of the language that Congress employed accurately expresses the legislative purpose." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (citations omitted).

Title VII repeatedly refers to "unlawful employment practice(s)" in contexts where it clearly refers to an ongoing violation.[11]

Nowhere does Title VII use the language "discrete acts" of discrimination or any equivalent language. According to both lay and legal definitions, the term "practice" includes a course of recurring conduct, rather than only singular, discrete acts. *Webster's Ninth New Collegiate Dictionary* 923 (1991) (defining "practice" as "a repeated or customary action"); *Black's Law Dictionary* 1172 (6th ed. 1990) (defining "practice" as "[r]*epeated* or customary action; habitual performance; a *succession* of acts of similar kind" (emphasis added)).

D. The Continuing Violation Doctrine Is Embodied in an EEOC Regulation and Management Directive Entitled to *Chevron* Deference

The Solicitor General notes in passing that the EEOC disagrees with the position set forth in the government's brief. The United States mentions only a single unreported April 2001 decision by the EEOC. Br. for the United States at 23. This passing reference seriously understates the longevity, consistency and legal significance of the Commission's position.

[11] For example, § 706(g)(1) itself authorizes relief where an employer is "engaging in an unlawful employment practice," a phrase which necessarily refers to ongoing conduct rather than a single discrete act. 42 U.S.C. § 2000e-5(g); *see also* 42 U.S.C. §§ 2000e-2(h), 2000e-2(i), 2000e-2(k), 2000e-6(a).

For more than thirty years, the EEOC has maintained that certain recurring discrimination, which it refers to as "continuing violations," warrant distinct treatment for Title VII limitations purposes.[12] The EEOC has consistently taken the position, both in its own cases and in amicus briefs, that redress can be provided for pre-charging period discrimination that is part of a continuing violation and that the two year back pay rule in § 706(g)(1) applies to such violations.[13] The EEOC's understanding of the law is codified in its Compliance Manual.[14] The

[12] *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1235 n.1 (N.D. Ga. 1968); *Cox v. U.S. Gypsum Co.*, 284 F. Supp. 74, 77 (N.D. Ind. 1968).

[13] *E.g.*, Brief of the EEOC as Appellee at 42-46, *EEOC v. Dinuba Med. Clinic*, 222 F.3d 580 (9th Cir. 2000) (No 98-16454) (sexual harassment a continuing violation); Brief of the EEOC as Amicus Curiae, *Ashley v. Boyle's Famous Corned Beef Co., Inc.*, 66 F.3d 164 (8th Cir. 1995) (No. 94-2174) (discrimination in salary and annual raises a continuing violation); Brief of the EEOC as Amicus Curiae, *Lee v. Air Prods. and Chem., Inc.*, 36 F.3d 1093 (4th Cir. 1994) (No. 94-1119) (repeated denials of promotion a continuing violation); Brief of the EEOC as Amicus Curiae, *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F.3d 1164 (7th Cir. 1996) (No. 94-3993) (sexual harassment a continuing violation); Brief of EEOC as Amicus Curiae, *Sendall v. Boeing Helicopters*, 22 F.3d 303 (3d Cir. 1994) (No. 93-1814) (salary discrimination as a continuing violation).

[14] 1 EEOC Compliance Manual § 22.6(a) [BNA] (2001) ("When cause has been found andthe relief to which aggrieved persons are entitled includes back pay, back pay should be sought for a period from the [date of violation] or the beginning of a continuing

Manual includes a detailed explanation of the types of practices which the Commission believes constitute a continuing violation.[15] The EEOC's construction is, at the least, entitled to substantial deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Congress, however, has accorded to the EEOC an even more authoritative role with regard to the application of Title VII to federal employees or applicants. Title VII expressly accords to the EEOC responsibility for adopting legislative regulations governing claims of discrimination in federal employment. 42 U.S.C. § 2000e-16(b). That responsibility includes assuring that victims of discrimination in federal employment receive the remedies provided by § 706(g)(1). 42 U.S.C. § 2000e-16(d).

The Commission's regulations require that in any case in which discrimination has been found, the victim must be awarded "[p]ayment . . . on a make whole basis for *any* loss of earnings the person may have suffered as a result of the discrimination," 29 C.F.R. § 1614.501(a)(4) (emphasis added), subject only to one limitation, that "back pay liability under title VII . . . is limited to two years prior to the date the complaint was filed." 29 C.F.R. § 1614.501(c)(1). In promulgating these

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violation (but not more than two years before the charge filing date or before the ADA applies) plus the period from the charge filing date until an agreement is executed."); *Id.* § 22.5(a) (Where class discrimination is indicated, "[i]f the alleged violation would constitute a continuing violation . . . identify persons for whom remedial relief may be sought back to the beginning of the period of the violation. . . . Generally, the period should extend back at least 2 years before the filing of the charge.").

[15] EEOC New Compliance Manual § 2, part 2-IV(C)(2).

federal sector regulations, the EEOC has twice emphasized that it regards discrimination victims as entitled to back pay from the date two years prior to the date when the formal administrative process was initiated.[16]

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[16] The Commission's comments were made in connection with the provision, now found in 29 C.F.R. § 1614.204(l)(3), requiring in the case of class complaints remedial action for any "policy or practice" in existence within "45 prior to [complainant's] initial contact with the Counsellor." Individuals aggrieved by alleged discrimination must initiate the administrative process by contacting a counsellor within 45 days of the discrimination.

When the Commission promulgated the 1992 version of these regulations, it explained:

"[t]he 45-day time limit in this section defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member." Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12, 644 (Apr. 10, 1992). The Commission made this point again when it amended the regulations two years ago.

> "[T]he 45-day time limit in section 204(l)(3) defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member. . . . Under the continuing violation theory, moreover, incidents occurring earlier than 45 days before contact with the counselor must also be remedied provided that the initial contact with the counselor was timely and the earlier incidents were part of the same continuing policy or practice found to have been discriminatory. That is, where contact with the counselor is timely as to one of the events com-

The Commission has also issued pursuant to its § 717 authority an order, Management Directive 110, instructing federal agencies how they are to administer the administrative complaint process.[17] Management Directive 110 expressly requires agency officials to treat complaints of continuing violations differently than charges of discrete violations:

> [I]ncidents that occurred outside the 45-day time limit should be investigated and remedied to the extent that they are sufficiently interrelated to a timely raised incident such that a continuing violation has been established. A continuing violation is a series of related acts, one or more of which falls within the limitations period, that are tied together with a common theme uniting the alleged discriminatory acts into a continuous pattern. When determining if a continuing violation exists, the following information is relevant to, but not necessarily dispositive of, the issue: whether the same officials were involved in the incidents, whether the incidents were similar in nature, and whether they recurred or were of a more isolated nature.(Ch. 5, part III(A)(3)). Both Management Direc-

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prising the continuing violation, then the counseling contact is timely as to the entire violation."

Federal Sector Equal Employment Opportunity, 64 Fed. Reg. 37,653 (July 12, 1999).

17 *See* Management Directive 110, *at* http://www.eeoc.gov/federal/md110.html.

> tive 110[18] and the EEOC federal sector regulations have the force of law and are binding on federal agencies, including the Department of Justice, when they implement the Title VII administrative process. The brief submitted by the United States in this action appears to be an unacknowledged attack on the validity of the regulations and Management Directive 110.

Under § 717(c) of Title VII, the Commission also engages in formal adjudication of appeals from agency, decisions regarding discrimination complaints by federal employees. *See, e.g., West v. Gibson*, 527 U.S. at 216. The Commission's invocation of the two year back pay is reflected as well in a large body of decisions adjudicating the discrimination claims of federal employees. *See* Supplemental Appendix. Agencies litigating claims before the EEOC expressly rely on the two year rule as delineating the proper scope of a remedial order.[19] The EEOC federal

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18 The transmission memorandum accompanying the issuance of the 1999 revised Directive noted, "The Commission's instructions are directive in nature, and heads of federal agencies are responsible for prompt and effective compliance with Commission Management Directives . . . . Since the commission's guidance is binding in nature, federal agencies are required to comply with it." Memorandum to the Heads of Federal Agencies (Oct. 28, 1999).

19 *E.g.*, Agency's Request for Reconsideration at 5, Stone v. O'Neill (Appeal No. 01A-02-572) ("The two-year period for which back pay may be awarded begins on the date the Complainant files a formal complaint with the commission. . . . Complainant filed the EEOC complaint on December 18, 1997. . . . Therefore, Complainant is not entitled to back pay [for the period before] December 18, 1995."). (Bureau of the Public Debt, Department of the Treasury.)

sector adjudications are also replete with applications of the Commission's view of the continuing violation doctrine.

The EEOC federal sector regulations, Management Directive 110 and the interpretation of Title VII embodied in the Commission's formal adjudications, are all entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). A similar degree of deference is accorded where an agency elucidates a statute through formal adjudication. *United States v. Mead Corp.*, __ U.S. ___ , 121 S. Ct. 2164, 2172-73 n.11 (2001). Certainly, *Chevron* deference is warranted on both grounds.

E. The Interpretation of Other Statutes Does Not Preclude Recognition of the Continuing Violation Doctrine under Title VII

Petitioner relies heavily on this Court's decisions regarding ongoing violations of the Clayton Act and RICO, insisting that they establish a general rule of law__"the accrual rule"--under which the statute of limitations runs separately on each occasion when a violation causes actionable injury. Pet. Br. 11, 20, 22. The United States suggests these cases establish a general principle of law regarding the legal definition and significance of a "continuing violation." Br. for the United States at 12. The RICO cases in question turn on the limitations rules for Clayton Act cases, since RICO itself has no limitations period, and the decisions of this Court have concluded that RICO cases should be governed by the standard for Clayton Act claims.[20]

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[20] *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89 (1997); *Agency Holding Corp. v. Malley -Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). *Klehr* also rejected the "last predicate act" rule because under it the limitations period could be extended for several decades. 521 U.S. at 187-88; *see Rotella v. Wood*, 528 U.S. 549, 554 (2000). That reasoning is clearly inapplicable to Title VII, since § 706(g)(1) limits pre-charge back pay to two years, half the Clayton Act limitations period.

The underlying Clayton Act cases indeed hold, as Petitioner suggests, that the accrual of each claim is of critical importance; whenever a statutory violation causes a discrete injury, a cause of action accrues with regard to that harm, and an action must be commenced within four years of the date of accrual. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). An ongoing violation of the Clayton Act results in a series of actionable injuries; each of those claims in turn is extinguished if no action is commenced with four years[21] after the date of accrual. But the Clayton Act accrual rule (and the RICO cases which incorporate it by reference) derives not from any general principle of jurisprudence, but from the specific terms of the Clayton Act limitations provision:

> Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action *accrued*.

15 U.S.C. § 15b (emphasis added). The date of accrual is of controlling importance under the Clayton Act because the statute expressly so provides. The wording of § 15b expressly de-

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[21] The four year rule in Clayton Act and RICO cases reflects a congressional judgment that for that period of time, memories were likely to be reliable and evidence still retained. *See Klehr*, 521 U.S. at 186. That judgment obviously undermines Petitioner's contention that Congress believed that in Title VII cases memories and evidence would be unavailable after a mere 180 to 300 days.

lineates a limitation on the permissible scope of any civil action, and expressly excludes redress for any claims which "accrued" more than four years earlier. The terms of § 706(e)(1) are emphatically different.[22]

Cases under the National Labor Relations Act provides even less support for Petitioner. This Court has invoked the NLRA where there was under that statute a substantial body of experience prior to 1964, or a clear and authoritative interpretation of the law. Neither are present here. In virtually all disputes arising under the NLRA, the unfair labor practice that gave rise to a back pay claim was the dismissal of a worker; the types of recurring violations that occur under Title VII, such as salary or hostile work environment discrimination claims, are virtually unknown in NLRA litigation. Petitioner and the United States can identify in the decades of pre-Title VII NLRA proceedings only two cases that even arguably present an ongoing violation of the rights of a complainant, and the parties in those cases did not litigate the period of time for which back pay might be awarded for a recurring violation.[23] The court of appeals in

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[22] In *Klehr*, the plaintiffs relied on the continuing violation decision in *Havens Realty* and several lower court Title VII decisions. Brief for Petitioners at 4, 7, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (No. 96-663). Neither party nor any of the numerous *amici* questioned the propriety of applying the *Havens Realty* continuing violation doctrine in discrimination cases. This Court's decision in *Klehr*, which carefully avoided mention of Title VII or Fair Housing Act cases, cannot plausibly be read to reject a line of decisions which no party had questioned.

[23] In *Melville Confections, Inc v. NLRB*, 327 F.2d 689, 690 (7th Cir. 1964), the Board had awarded only prospective injunctive relief.

NLRB v. Pennwoven, Inc., 194 F.2d 521, 525 (3d Cir. 1952), concluded that no such recurring violation had even occurred. This is far to thin a reed to support any inference about the intent of Congress.

The provisions of the NLRA, moreover, are in several material respects different than Title VII. First, the NLRA has no two year (or other) back pay rule comparable to § 706(g)(1). Second, unlike the NLRA, Title VII expressly permits enforcement action in the absence of *any* timely predicate charge. Congress clearly intended to bar any proceedings under the NLRA that had not been the subject of a charge filed within 180 days of the alleged unfair labor practice; absent such a timely predicate charge the General Counsel cannot institute proceedings before the Board. But the 1964 provisions of Title VII expressly permitted the Department of Justice to bring a pattern and practice suit regardless of whether there had ever been a timely charge about the discrimination in question. 42 U.S.C. § 2000e-6.

On the other hand, Morgan's proposed treatment of ongoing violations is not unique to Title VII. In the criminal law, an ongoing conspiracy, larceny or embezzlement is dealt within the same manner. So long as the last act of the ongoing offense occurred within the limitations period, the perpetrator can be prosecuted for the entire series of events. 3 *Wharton's Criminal Law* §§ 93, 94, 370 (15th ed. 1995).

F. Where the Discrimination Prior to the Charge Filing Period Is Sufficiently like or Related to the Discrimination Occurring Within the Charge Filing Period That the Employer Is on Notice of the Need to Investigate Those Earlier Events, Plaintiffs Should Be Allowed to Establish Liability for the Earlier Acts

The continuing violation doctrine was generally accepted in the era when Congress adopted the 1972 amendments to Title VII. Subsequent decisions applying that doctrine, and using a standard similar to that of the Ninth Circuit below, can be found in the Second,[24] Third,[25] Fourth,[26] Sixth,[27] Eighth,[28] and District

[24] *See Fitzgerald v. Henderson,* 251 F.3d 345, 359 (2d Cir. 2001); *Bonner v. Guccione,* 178 F.3d 581, 583-84 (2d Cir. 1999); *Cornwell v. Robinson,* 23 F.3d 694, 704 (2d Cir. 1994).

[25] *See Courtney v. La Salle Univ.,* 124 F.3d 499, 506 (3d Cir. 1997); *Rush v. Scott Specialty Gases, Inc.* 113 F.3d 476, 481-82 (3d Cir. 1997); *West v. Phila. Elec. Co.,* 45 F.3d 744, 754-55 (3d Cir. 1995).

[26] *See Beall v. Abbott Labs.,* 130 F.3d 614, 620-21 (4th Cir. 1997); *Taylor v. Home Ins. Co.,* 777 F.2d 849, 856 (4th Cir. 1985).

[27] *See Burzynski v. Cohen,* No. 99-4298, 2001 U.S. App. LEXIS 18997 (6th Cir. Aug. 23, 2001) (Title VII and ADEA); *Haithcock v. Frank,* 958 F.2d 671, 677-78 (6th Cir. 1992) (Title VII); *Hull v. Cuyahoga Valley Bd. Of Educ.,* 926 F.2d 505, 510-11 (6th Cir. 1991); *Roberts v. N. Am. Rockwell Corp.,* 650 F.2d 823, 827-28 (6th Cir. 1981).

[28] *See Jenson v. Eveleth Taconite Co.,* 130 F.3d 1287, 1302-03 (8th Cir. 1997); *Varner v. Nat'l Super Mkts.,Inc.,* 94 F.3d 1209, 1214 (8th Cir. 1996); *Gardner v. Morris,* 72 F.2d 1271, 1270 (8th Cir. 1985); *Scott v. St. Paul Postal Serv.,* 720 F.2d 524, 525 (8th Cir. 1983); *Gross v. United States,* 676 F.2d 295, 299-300 (8th Cir. 1982).

of Columbia Circuits.[29] Disputes about what constitutes a "continuing violation" are not about the inherent meaning of some general legal phrase, like "*res judicata*" or "jurisdiction." Rather, in the Title VII context "continuing violation" denotes those situations in which it is appropriate to permit a plaintiff to obtain redress for pre-charge filing discrimination because it has a sufficient connection to discrimination occurring within the charge filing period.[30]

> The proper formulation derives from the text of Title VII itself and from the purposes of a statute of limitations. So long as the pre- and post- charge filing period discrimination can fairly be said to constitute the same "practice," the exhaustion requirements of § 706(e)(1) have been met. Decisions of this Court have made clear that the scope of the subject matters encompassed by Title VII charge will be broadly construed. *EEOC v. Shell Oil Co.*, 466 U.S. at 68-74.[31]

[29] *See Anderson v. Zubieta,* 180 F.3d 329, 337 (D.C. Cir. 1999); *Valentino v. U.S. Postal Serv.,* 674 F.2d 56, 65 (D.C. Cir. 1982).

[30] A number of district courts have recognized that where a continuing violation is alleged, concerns as to a defendant's prejudice are absent or diminished and an employer maintaining an unlawful practice is in a less sympathetic position when seeking repose; the continued nature of the policy represents its affirmative perpetuation and is susceptible to characterization as a conscious waiver of limitations period protection. *EEOC v. Home Ins. Co.*, 553 F. Supp. 704, 713 (S.D.N.Y. 1982); *see also EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1087 (C.D. Ill. 1998); *Glass v. IDS Fin. Servs., Inc.*, 778 F. Supp. 1029, 1054 n.41 (D. Minn. 1991).

[31] This is certainly the position of the overwhelming number of circuit courts. *See, e.g., EEOC v. Keco Indus.,* 748 F.2d 1097, 100-01

> Whether several discriminatory acts ought be said to involve a single "practice" should be resolved in light of the central purpose of Title VII's Charge Filing Requirement, to provide a defendant with a reasonable opportunity to preserve evidence and to interview witnesses while their memories are still reliable.

We urge the Court to adopt the following standard to delineate the scope of the continuing violation doctrine under Title VII:

> Discrimination occurring prior to the charge filing period may be redressed where that earlier discrimination is sufficiently similar in method or purpose to the discrimination alleged by the charge to have occurred within the charge filing period that the employer can fairly be said to have been put on notice of the need to inquire into the relevant pre-charge filing period events.

This standard will ordinarily be met where the form of discrimination is the same. *E.g., Havens Realty,* 455 U.S. at 380-81 (racial steering). An employer which received a charge of salary discrimination would readily understand what facts (before and during the charge filing period) should be looked into. The particular purpose alleged in a charge (e.g. retaliation for resisting sexual harassment) might also draw the employer's attention to specific matters (i.e. the underlying harassment) earlier in the two year period.

(6th Cir. 1984); *Ong v. Cleland,* 642 F.2d 316, 318-19 (9th Cir. 1981); *Hicks v. ABT Assoc., Inc.,* 572 F.2d 960, 966 (3rd Cir. 1978); *EEOC v. Gen. Elec. Co.,* 532 F.2d 359, 365-67 (4th Cir. 1976); *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.,* 538 F.2d 164, 167-68 (7th Cir. 1976) (en banc); *EEOC v. W. Publ'g Co.,* 502 F.2d 599, 602-03 (8th Cir. 1974); *Macklin v. Spector Freight Sys. Inc.,* 478 F.2d 979, 987-88 (D.C. Cir. 1973); *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 465-66 (5th Cir. 1970).

The Title VII charge in the instant case easily meets that standard. EEOC Charge, Morgan Decl., CD No. 106. First, the charge identified two specific forms of discrimination--unwarranted disciplinary measures and denials of training--which occurred both inside and prior to the charge filing period. Second, the charge identified a specific purpose--retaliation--and made clear that the protected activity which had allegedly triggered the repeated retaliation had occurred as far back as 1991. Third, the charge alleged a repeated array of discriminatory practices likely to create a hostile work environment. Morgan was clearly entitled to the benefit of the continuing violation doctrine.

II. IN DETERMINING WHETHER A HOSTILE WORK ENVIRONMENT EXISTED WITHIN THE CHARGE FILING PERIOD, THE TRIER OF FACT MUST CONSIDER EARLIER ACTS OF HARASSMENT OR OTHER TYPES OF DISCRIMINATION WHICH MAY HAVE CREATED THE HOSTILE ENVIRONMENT

There is a natural affinity between the continuing violation doctrine and a claim of a hostile work environment. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989); *West v. Phila. Elec. Co.*, 45 F.3d 744, 755 (3rd Cir. 1995); *O'Rourke v. City of Providence*, 235 F.3d 713, 727-28 (1st Cir. 2001). In

2001). In the instant case, the district court's ruling that Morgan could not rely on acts of harassment or other discrimination that occurred before May 3, 1994[32] to establish the existence of a hostile work environment during the 180/300 day charge filing period rested on a fundamental misunderstanding of the nature of a hostile environment claim. Unlike a discriminatory hiring or firing decision, an act of harassment is never actionable per se.[33] Rather, in a hostile environment case, it is the existence of the resulting environment--not the incidents that combined to produce it--that constitutes the violation. In both *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742 (1998), the carefully framed standard for employer liability was predicated upon an *actionable hostile environment*. This Court's decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 18-19 (1993), concerned "the definition of a discriminatorily 'abusive work environment' (also known as a 'hostile work environment') under Title VII."

That the hostile environment itself, not the incidents that caused it, constitutes the actionable Title VII violation follows

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[32] This analysis discusses what would constitute a hostile environment *during* the charge filing period. As we explain *supra*, where a plaintiff demonstrates that a hostile environment which continued into the charge filing period first came into existence on an earlier date, the continuing violation doctrine also permits the plaintiff to obtain relief for the *pre*-charge filing period violation.

[33] Many acts of discrimination, such as a discriminatory demotion, could contribute to a hostile environment. Such an incident would be actionable by itself insofar as the plaintiff sought back pay or restoration to the lost position. But to the extent that the plaintiff asserted the demotion had contributed to a hostile environment, only the environment itself would be actionable.

from several aspects of harassment law. First, save in exceptional circumstances, a single incident of harassment cannot create a hostile environment, and thus could not by itself create an actionable claim. The cumulative effect of that first and later incidents may do so, but those subsequent developments could not render the first incident illegal *nunc pro tunc.*

Second, an actionable hostile environment claim only exists if the victim perceives the environment as hostile or abusive. *Harris*, 510 U.S. at 21-22. The victim's subsequent perception however, could not alter retroactively the legality of the harassment. Third, an employer can be liable under Title VII if it negligently failed to protect the victim from a hostile environment created by harassment by fellow employees or customers. *Faragher,* 524 U.S. at 789; *Burlington Industries*, 524 U.S. at 759. Yet such harassment by itself could ordinarily not violate Title VII.

In harassment cases, as in any other, "the critical question is whether any present *violation* exists." *Evans*, 431 U.S. at 558 (emphasis in original).[34] Once a hostile environment has been

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[34] Where an employer unlawfully denies a plaintiff seniority, that denial itself is a complete violation; the consequent "effect" or "impact" of that violation, including resulting loss of employment, do not themselves constitute violations. *Evans*, 431 U.S. at 558.

But in a hostile environment case, incidents of harassment do not themselves constitute a violation; a violation occurs only if and because those incidents combine to create a hostile environment. Harassment brings about an actionable claim where it has the "effect of . . . creating an intimidating, hostile, or offensive working environment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); *see id.* at 66

created, that violation exists so long as that environment itself endures. It would be nonsensical to suggest that a present hostile environment violation exists only during those often fleeting moments when new acts of harassment are occurring.

The district court thus erred in holding that acts of harassment, i.e., those occurring before May 3, 1994, were "time barred." Only violations can be time barred, not events which may have brought them about. If incidents of harassment more than 300 days prior to a charge could be "time barred", there could never be an actionable hostile environment on the 300th day, because there would not be any prior incidents on which a plaintiff could rely.

In determining whether a hostile environment existed in that period, the trier of fact must consider all the earlier harassment or other acts of discrimination which might have contributed to the existence of such an environment. The relevant restriction on the significance of temporally more remote incidents is not the statute of limitations, but the trier of fact's assessment of causation. Incidents years prior to the 300th day may not to contribute greatly to the existence of a hostile environment within the charge filing period. In the absence of additional incidents, a hostile environment might even dissipate over time.[35]

(creating a hostile environment through discriminatory practices); *id.* at 67 (creating a hostile work environment through harassment). Thus in a hostile environment case, the *effect* of the harassment, far from being a non-actionable incidental consequence, is an essential element of the claim.

[35] In some circumstances, of course, that would not occur. If a victim had been sexually assaulted by a co-worker, a hostile environment would likely continue indefinitely if that assailant were permitted to work in the same facility.

But while the passage of time will reduce the impact of past incidents of harassment, the assessment of the weight of such evidence will ordinarily be a matter for the trier of fact, not for the court on summary judgment.

In the instant case, the district court's order and subsequent jury instructions improperly precluded Morgan from using events occurring prior to May 3, 1994, to establish even the existence of a hostile environment during the charge-filing period.

II. WHETHER MORGAN BELIEVED PRIOR TO 1995 THAT HE WAS THE VICTIM OF UNLAWFUL DISCRIMINATION IS IRRELEVANT

The notice requirement which Petitioner seeks to graft into the "continuing violation doctrine" analysis is totally inapposite to appropriate Title VII jurisprudence. This requirement that the Fifth and Seventh Circuits impose upon plaintiffs improperly shifts the inquiry from whether *vel non* there is a current actionable Title VII violation by the employer to plaintiffs' state of mind at some point in the continuum of events or policies or practices upon which the action is based. *See Galloway v. Gen. Motors Serv. Parts*, 78 F.3d 1164 (7th Cir. 1996); *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983).[36]

Rather, if a violation is alleged which occurred within the 300 day charge filing period, the question whether the plaintiff

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[36] *But see Cuddyer v. The Stop & Shop Supermarket Co.*, 434 Mass. 521, 534-36, 750 N.E.2d 928, 938-39 (2001) (criticizing the "revelatory standard" articulated in *Galloway* and *Berry*).

formed a belief that he was the victim of actionable employment discrimination at an earlier time becomes moot. Indeed, requiring plaintiffs to determine the legal ramifications of an employer's actions flies in the face of the Congressional mandate that this remedial statute be interpreted in a manner that provides for the maximum relief for aggrieved parties and must not be countenanced by this Court. *Cf. Franks*, 427 U.S. at 763-64; *Albemarle Paper Co.*, 422 U.S. at 418-22 (stating that Congressional purpose concerning Title VII was to effectuate the highest national priority of providing complete relief for those suffering from employment discrimination).[37]

In *Zipes*, this Court defined the 180-300 day charge filing period so as to "honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." 455 U.S. 398. A desire to encourage prompt filing of claims cannot un-

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[37] Any requirement that an aggrieved person make a binding decision as to when further efforts at informal conciliation with his employer would be futile places him in an impossible position. Indeed, requiring such a determination by a lay person would be especially bothersome in the hostile atmosphere situation where even the most cursory review of the reported authorities establishes the courts' continued inability to identify what degree of behavior is "severe" or, more importantly here, "pervasive," particularly where there is a continuing employment relationship. Moreover, if one is exhausting the company's grievance process as required by *Ellerth* and *Faragher*, the employer can manipulate the requisite degree of "permanence" that an employee must intuit. Thus, any such requirement would certainly eviscerate this Court's apt recognition of the persons normally filing a charge and their limitations as lay persons to make any such determinations. *See Love v. Pullman Co.*, 404 U.S. at 527.

dermine the broad remedial purposes of Title VII - dating the charge filing period from the first act or some intermediate act (i.e., when the plaintiff realized that she had a claim) instead of the last act destroys the balance created by this Court in *Zipes*.

IV. MORGAN IS ENTITLED TO A NEW TRIAL TO DETERMINE AMTRAK'S LIABILITY WITHIN THE CHARGE FILING PERIOD

During the course of the trial, the district court repeatedly barred or severely limited the evidence from outside the 300-day charge filing period which should have been used to determine Amtrak's liability for discrimination within the charge filing period. Morgan expressly raised these issues on appeal.[38] The Ninth Circuit, although expressing serious reservations about the actions of the district court, stopped short of resolving that aspect of the appeal. *Morgan*, 232 F.3d at 1018.

A. The District Court Erred in Limiting Evidence of The Hostile Work Environment from Outside the 300-Day Charge Filing Period

As set forth herein, the district court disregarded this Court's jurisprudence when it required the jury to look at discrete acts rather than the environment as a whole to determine the hostile environment claim. *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765 (referring to an "actionable hostile *environment* created by a supervisor") (emphasis added). This Court has clearly mandated that courts should consider a broad range of conduct. *See Harris*, 510 U.S. at 22-23; *Faragher*, 524 U.S. at 787-88. Indeed, the Court articulated just last term that

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[38] Appellant's Opening Brief at 2-3.

"[w]orkplace conduct is not measured in isolation; instead, 'whether an environment is sufficiently hostile or abusive' must be judged 'by "looking at all the circumstances."'" *Clark County Sch. Dist. v. Breeden*, __ U.S. __, 121 S. Ct. 1508, 1510 (2001) (internal citations omitted).

In both *Meritor* and *Faragher*, this Court explicitly referenced evidence of harassing conduct that occurred outside the applicable limitations period. *See Meritor*, 477 U.S. at 59-60 (considering evidence spanning a number of years); *Faragher*, 524 U.S. at 782 (considering evidence spanning a five-year period).

The district court below failed to heed this Court's oft-repeated guidance. It deprived the jury of the necessary opportunity to evaluate the nature of the overall environment to which Morgan was subjected through a consideration of "all the circumstances." Thus, the determination that the hostile environment was not "sufficiently severe or pervasive" is fundamentally flawed and must be reversed.

B. The District Court Erred in Limiting Evidence of Intentional Discrimination from Outside the 300-Day Charge Filing Period

The district court also erred in its assessment of the legal consequences of the expiration of the charge filing period regarding a particular discriminatory incident. Decisions of this Court have long made clear that evidence of intentional discrimination from outside the charge filing period can be crucial for proving intentional discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (evidence from more than a year outside the charge filing period may be relevant to respondent's claims); *Patterson v. McLean Credit Union*, 491 U.S. 164, 178 n.2 (1989) (examining manager's discriminatory behavior toward other African American employees).

Similarly, in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 n.2 (1983), this Court again looked at evidence well outside the charge filing period. ("Aikens showed that white persons were consistently promoted and detailed over him and all other black persons between 1966 and 1974."). Most recently, in *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S. Ct. 2097, 2111 (2000), this Court found crucial support for the plaintiff's claim of an unlawful 1995 dismissal in evidence suggesting that in 1993, the employer had singled out plaintiff for investigation and discipline while ignoring a younger manager with a similar record.

The district court erred in its utter failure to correctly apply the Federal Rules of Evidence. Rule 401 defines relevant evidence very broadly.[39] Pursuant to Rules 401, 403 and 404, courts have admitted evidence from outside the 300-day charge filing period to prove motive and intent.[40]

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[39] "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

[40] *Commonwealth of Pa. v. Porter*, 659 F.2d 306, 320 (3d. Cir. 1981) (en banc) ("Evidence of the prior actions was admitted, as the trial court noted, under Fed. R. Evid. 404(b), to show motive [or] intent . . . . The injunction was issued . . . because . . . a pattern or practice of violations occurred over a long period of time which extended

In the Final Pretrial Scheduling Order, the district court ruled that although Mr. Morgan could testify to his work history, he could not "characterize the events underlying his time-barred or adjudicated claims as 'discrimination' or 'retaliation,'" nor could he "elicit such characterization from other witnesses." CD at 176. During the trial, beginning with the voir dire, the court repeatedly issued limiting instructions indicating that this evidence was only for context and background. For example, at one point the court told the jury such evidence would "not be part of anything you will be asked to decide in this case." *See* Trial Tr. at 431-33. Because the jury could not rely on all of the admissible evidence, whatever interpretation the Court chooses to adopt for the continuing violation doctrine, justice requires a new trial in this case.

V. THIS CASE SHOULD BE REMANDED TO THE NINTH CIRCUIT TO ALLOW IT TO REVIEW THE DISTRICT COURT'S LIMITATION AND EXCLUSION OF EVIDENCE OF DISCRIMINATION AND HARASSMENT

well within the period of the statute of limitations, and was likely to continue in the future.") (internal citations omitted); *see also Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1998) ("A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries"(quoting *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987))); *Allen v. County of Montgomery*, 788 F.2d 1485, 1488 (11th Cir. 1986).

In *Breeden*, 121 S. Ct. at 1509, and *Faragher*, 524 U.S. at 782, this Court subscribed to the view that evidence of harassment against other members of the protected class is relevant to a hostile work environment claim by explicitly referencing evidence that the complainant's supervisors had engaged in harassing conduct directed toward other women in the workplace. *See also Aikens*, 460 U.S. at 714 n.3.

Many circuit courts have interpreted the Federal Rules of Evidence to evidence of harassment or discrimination against other members of the protected class to establish plaintiff's individual claim of harassment. *See, e.g., Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 110 (3d Cir. 1999).[41] Numerous circuit courts have found that evidence of discriminatory conduct directed at others in the workplace is relevant to a plaintiff's individual claim. *See, e.g., Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988); *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130, 1134 (4th Cir. 1988).[42]

The district court's exclusion of evidence of discriminatory behavior by Morgan's supervisors inappropriately restricted Morgan's presentation of his case. Therefore, regardless of this Court's holding on the continuing violation

[41] *See also Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995); *Glass v. Phila. Elec. Corp.*, 34 F.3d 188, 194 (3d Cir. 1994); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986).

[42] *See also EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994); *Douglass v. Eaton Corp.*, 956 F.2d 1339, 1344-45 (6th Cir. 1992); *Phillips v. Smalley Maint. Servs., Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983).

doctrine, the case should be remanded to the Ninth Circuit so that it may rule on these unresolved evidentiary issues.

CONCLUSION

Continuous violations of Title VII are especially harmful to public policy. They involve an ongoing pattern of discrimination rather than a single isolated act of discrimination. As such, they are a matter of special concern, and some flexibility in interpreting the charge filing requirement is warranted to stamp them out.

Amtrak's assertions that Title VII violations are less complex than other unlawful practices or "easy to detect" are ludicrous. Its assertion that hostile environment cases are "rare" is equally ridiculous. To allow Amtrak to escape responsibility for the three years of blatantly racist and unlawful conduct by its top managers which occurred outside the 300 day limitations period would be intolerable. It would severely compromise the goal of Title VII to root out and eradicate entrenched and ingrained forms of discrimination in the workplace.

For all of the reasons stated herein, the Ninth Circuit decision should be affirmed.

Respectfully Submitted,

PAMELA Y. PRICE, ESQ.
Counsel of Record
PRICE AND ASSOCIATES
1617 Clay Street
Oakland, CA 94612
(510) 452-0292

RESPONDENT'S SUPPLEMENTAL APPENDIX

Additional Statutory Provisions Involved

15 U.S.C. § 15b.

Any action to enforce any cause of action under section 4, 4A, or 4C shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

42 U.S.C. § 2000e-5(e)(1).

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged

unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(g)(1).

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. § 2000e-16(b) - (d).

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall:

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to:

> (1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and
>
> (2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

Additional Regulatory Provisions Involved

29 C.F.R. § 1614.501(a)(4).

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, which shall include the following elements in appropriate circumstances . . .

> (4) Payment to each identified victim of discrimination on a make whole basis for any loss of earn-

ings the person may have suffered as a result of the discrimination . . . .

29 C.F.R. § 1614.501(b)(3).

(b) Relief for an applicant. . . .

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

29 C.F.R. § 1614.501(c)(1).

(c) Relief for an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

EEOC Administrative Determinations

Wood v. Richardson, 1998 WL 746368, at *7.

Boykin v. Shalala, 1998 WL 745686, at *2.

Douglas v. West, 1997 WL 377511, at * 11.

Carney v. Brown, 1996 WL 506285, at *9.

Carter v. Dalton, 1995 WL 619313, at *1.

Alexander v. Cisneros, 1995 WL 576911, at *8.

Malone v. Widnall, 1995 WL 576890, at *8.

Cotton v. Shalala, 1996 WL 33170688, at *6-*8.

Davis v. Bentsen, 1994 WL 748457, at *4.

Miller v. Runyon, 1993 WL 1510049, at *9.

Joseph v. Runyon, 1993 WL 1509383, at *3.

Walker v. Gordon, 1993 WL 1507466, at *5.

Brown v. Brown, 1993 WL 1507219, at *1.

Guess v. Barr, 1992 WL 1371923, at *1.

Brown v. Franklin, 1992 WL 1370975, at *1.

Fitzgerald v. Runyon, 1990 WL 1108836, at *1.

Caouette v. Frank, 1990 WL 2566, at *5 n.2.

King v. Cavazos, 1990 WL 1008026, *4.

Amador v. Abdnor, 1989 WL 1005970, at *1.

Mahan v. Frank, 1989 WL 1006514, at *4 n.2.

DuBose v. Derwinski, 1989 WL 1003984, at *2.

Caouette v. Frank, 1988 WL 918307, at *1.

Wewers v. Alderson, 1988 WL 918056, at *1.

Young v. Dep't of the Navy, 1987 WL 768941, at *1.

Jackson v. U.S. Postal Serv., 1987 WL 775782, *1.

Russell v. Dep't of the Army, 1987 WL 775164, at *4.

Cocciardi v. Defense Logistics Agency, 1987 WL 775472, at *3.

Hickman v. Dep't of the Army, 1985 WL 568695, at *4.

Graciano v. Dep't of Justice, 1984 WL 485017, at *2.

Ahrens v. U.S. Postal Serv., 1983 WL 412373, at *3.

Appellant v. Agency, 1978 WL 181629, at *1.